Supreme Court, U.S.
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No. 99-

In the

Supreme Court of the United States

October term, 1999

ABDUL AZIZ,

Petitioner,

v.

BLUEFIELD STATE COLLEGE,

Respondent.

On the petition for a writ of certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

1. Whether the court of appeals has violated SEC. 4. (a)(1) of ADEA of 1967, as amended.

2. Whether the court of appeals has violated the Supreme Court opinions on Federal Rules of Civil Procedure 56(c), and on Conley v. Gibson 355 U.S. 41 (1957).

3. Whether courts possess, should possess or are required to possess technical expertise to evaluate the qualifications of engineers by judge trials.

4. Whether, for hiring discriminations, a further amendment is feasible or needed to the existing 1993 Supreme Court Opinion shown below:

> There are two methods by which a plaintiff can attempt to prove potential discrimination. First, plaintiff may present direct evidence of employment discrimination. Second, the plaintiff can rely on the three stage order of proof and presumptions and satisfy his burden of proof using circumstantial evidence. *St. Mary's Honor Ctr. v. Hicks* 509 U.S. 502, 506-12, 113 S. Ct. 2742 (1973).

5. Whether the summary judgment to dismiss the complaint by the court by a judge trial was appropriate.

6. Whether the qualifications of candidates for which the district courts are not qualified to make judgments by judge trials should be precluded pursuant to Rule 56.

7. Whether the courts are as discriminatory as the employers for whom laws were enacted.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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TABLE OF AUTHORITIES

Coordinates of authorities are given below in parenthesis. First digits are page numbers, second digits are line numbers. Headlines and sub-head lines are all counted as lines. (3 14) is page 3, line 14.

Authorities are cited in bold faces:

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1. ADEA of 1967: (i 2), (1 24), (2 6), (4 20) (4 21), (5 24), (8 6), (19, 3), (25 1), (25 6),

2. §§ 2000-e2, Title VII: (8 11), (18 26),

3. Rule 56(c): (i 6), (2 56), (5 27), (6 10), (6 26), (7 23) (8 25), (19 29), (26 17).

4. Supreme Court Opinion, Conley v.Gibson 355 U.S.41(1957): (i 6), (6 11), (7 8).

5. Supreme Court Opinion on St. Mary's Hon. Ctr. v. Hicks 509 US 502, 506-512, 113 S. Ct. 2742 (1973): (8 3).

6. Anderson, 477 U.S. at 248: (14 24).

7 Inland Oil v. United States: 600 F. 2d 725 (8th Circle. 179): (15 3).

8. Id at 255: (15 18)

9. Schrob v. Catterson: 948 F. 2d 1405 (3rd Cir. 1991) (16 13)

10. Markowitch v. Northewest Land Co.: 906 , F, 2d 100, (3rd Cir. 1991) (16 14).

11. Counts v. M. K. Ferguson Co.: 862 F. 2d 1338 (16 25)

12. Ransom v. Marrazzo,: 848 F. 2d 398, 401 (3rd Cir. 1988) (17 26).

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

Abdul Aziz, *Petitioner,*

v.

Bluefield State College, *Respondent.*

I. PETITION FOR WRIT OF CERTIORARI

Petitioner, Abdul Aziz, petitions this court to grant a writ of certiorari to review the judgment of the United States Court of Appeals & the District Court.

II. OPINIONS BELOW:

None published. Appeals Court decision affirming district court order is in exh._1_, page 1a. Appeals Court decision for rehearing en banc is in exh._2_, page 2a. District Court decision dismissing the complaint is in exh._3_, page 11a.

III. JURISDICTION:

1. The date of final judgment to be reviewed was entered on October 25, 1999..

2. Jurisdiction is conferred upon the Supreme Court by Rule 10 (c), which says "a United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this court," **and** "has decided an important federal question in a way that conflicts with relevant decision of this court."

3. And jurisdiction is conferred upon the Supreme Court by federal law, ADEA of 1967, as amended that has not been decided, but should be settled by this court.

IV. STATEMENT OF THE CASE

In response to an advertisement for a faculty position by the respondent, the petitioner applied. But he was not hired. Petitioner filed a suit in the federal district court, presented the advertisement of the position, the resumes of the plaintiff and of the selectee, pursuant to ADEA of 1967, as amended. At the same time the defendant filed a motion pursuant to Fed. Rules of Civ Proc. 56(c). District court dismissed the case without a trial. Petitioner appealed to the appellate court which affirmed the district court judgment, exh._1_.

V. STATEMENT OF THE ISSUES

1. The summary judgment was not appropriate. A summary judgment is appropriate when the petitioner's allegations were frivolous. The petitioner's allegations were:

(i) A less qualified person hired.
(ii) Petitioner belongs to the protected group by virtue of his age. He was 63 and his competitor was 48.

None of the above two allegations are frivolous. They cannot be frivolous because both of them are true and basis of the complaint. This #1 issue. and the #2 issue is: Plaintiff belongs to the protected group by virtue of his age.

The district court has not resolved these two issues. And the appellate court overlooked them.

2. That plaintiff was better qualified than selectee as shown below by a comparison:

VI. COMPARISON OF QUALIFICATIONS

Required qualifications:*

No. 1. Minimum degree required: An MSME.: I have a Ph.D. **Selectee has not.**
No. 2. Minimum 15 graduate semester hours required in M.E. I have more than 60 graduate semester hours, **selectee has less than 24.**

No. 3. Three years of relevant industrial experience required:
I have more than 20 years of relevant experience, **selectee has less than that.**

Preferred qualifications:*

No. 4. Professional registration **preferred**: None of us has, exhs. _ 4_& 5_.

No. 5. Teaching experience **preferred**: I have 6 years, selectee has none.

No. 6. The advertisement, exh.2, calls for experience in teaching mechanical engineering **2 + 2** program. I have 4 years of teaching mechanical engineering **2+2** program. **Selectee has none.**

Desirable qualifications are*

No. 7. Courses to be taught in mechanical engineering technology:

I have taught more than 13 courses, **exh. 4. Selectee has none, exh 5.**

No. 8. Advising: I have 4 years of advising, **Selectee has none.**

No. 9. Teaching Laboratory: I have taught for 6 years,* **selectee has for none.**

No. 10. University Services: I have 4 years,* **Selectee has none.**

No. 11. Maintaining office hours: I have maintained 10,* **selectee has none.**

No. 12. I have 4 years of service in Faculty Committees,* **selectee has none.**

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* Exhibit 2.

So, I am better qualified in every qualification.

The district court as well as the appellate court overlooked this comparison.

VII. ARGUMENTS TO THE QUESTIONS PRESENTED

1. Whether the court of appeals has violated SEC. 4. (a)(1) of ADEA of 1967.

ADEA of 1967 is the governing law for the case Facts of the case are:

(i) The position was advertised, (ii) The plaintiff applied for the position, (iii) The employer refused to hire him, (iv) The plaintiff belongs to the protected group by virtue of his age. At the time of application, plaintiff was 63, and selectee was 50. **All of these are facts.**

Section 4. (a)(1) says:

It shall be unlawful for an employer to refuse or fail to hire an individual, despite his/her qualifications, or otherwise to discriminate an individual because the individual belongs to the protected group by virtue of his/her age

The term "despite qualifications" implies that "though the plaintiff was better qualified, he was discriminated against". And the phrase "otherwise to discriminate" is a definition of discrimination according to the dictionary, but not unlawful. **The dictionary definition of discrimination becomes unlawful when it is based on prohibited characteristics.**

Exhs._2 & 3_ are the employer's advertised qualifications. Exhs._ 4 & 5_ are the resumes of plaintiff and selectee. Exh. 6 is the evaluated qualifications of the candidates from exhs._4 & 5_. From exh._6_ it is seen that plaintiff is better qualified than selectee in each and every 12 qualifications advertised. **Therefore, the court of appeals has violated SEC. 4. (a)(1) of ADEA of 1967, as amended. This is the most direct method to be applied, because it is the law itself.**

2. Whether the court of appeals has violated Federal Rules of Civil Procedure 56(c), the one and only one Federal of Civil Procedure for summary. It says,

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interroga-

> tories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

The defendant did not show that there was no genuine issue as to any material fact and that the moving party was entitled to summary judgment as a matter of law. The appellate court has overlooked this federal rule and, therefore, violated the same.

3. Whether the court of appeals has violated Supreme Court opinions on Federal Rules of Civil Procedure 56(c) and on Conley v. Gibson 355 U.S. 41 (1957).

Supreme Court Opinion on FRCP 56 (c) says,

> The plain language of Rule 56(c) mandates the entry of summary judgement, after adequate time for discovery and upon motion, against a party who fails to make sufficient showing to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact'.

Defendant did not demonstrate that plaintiff has failed "to make sufficient showing to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof **at trial**." Yet the district court dismissed the case and the court of appeals affirmed. **So, the court of appeals has violated the Supreme Court Opinion on Federal Rules of Civil Procedure 56(c).**

And according to the Supreme Court Opinion, Conley v. Gibson 355 U.S. 41 (1957).

In appraising the sufficiency of a complaint, we follow,

> of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of

> facts in support of his claim which would entitle him to relief.

Defendant has not shown beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief..

Yet the district court dismissed the case. and the court of appeals affirmed. **Therefore, the court of appeals has violated the Supreme Court Opinion, Conley v. Gibson 355 U.S. 41 (1957).**

4. Whether courts possess, should possess or are required to possess technical expertise to evaluate the qualifications of mechanical engineers by judge trials.

Courts do not possess, should not possess or are not required to possess the necessary technical expertise to evaluate the qualifications of two mechanical engineers by judge trials. So, the courts cannot settle such cases as a matter of law pursuant to Rule 56(c) **by judge trials**. The courts must submit such cases to jury trials precluding such qualifications. Yet, the district court dismissed the case knowing fully well that it was not qualified to evaluate the qualifications of the two engineers and the court of appeals affirmed.

Therefore, the court of appeals has violated the Federal Rules of Civil Procedure 56(c).

5. Whether, for hiring discriminations, a further amendment is feasible or needed to the existing 1993 Supreme Court Opinion shown below:

> There are two methods by which a plaintiff can attempt to prove potential discrimination. First, plaintiff may present direct evidence of employment discrimination.

Second, the plaintiff can rely on the three stage order of proof and presumptions and satisfy his burden of proof using circumstantial evidence. *St. Mary's Honor Ctr. v. Hicks* 509 U.S. 502, 506-12, 113 S. Ct. 2742 (1973).

The amendment will read as follows:

"For discrimination in hiring, the direct method will be the direct application of SEC. 4. (a)(1) of ADEA of 1967, and § 2000e-2 of Title VII of Civil Rights Act of 1964, as amended. In such an amendment, no circumstantial evidence will be needed."[1]

The above amendment is actually a clarification of the terms, "methods" and "direct evidence". This clarification will eliminate the many different interpretations they may have. If the Hon. Supreme Court deliver such an opinion, the adjudication of complaints "for discrimination in hiring" will be much shorter and quicker resulting in judicial economy.

6. Whether the summary judgment to dismiss the complaint by the courts by judge trials was appropriate.

It has been demonstrated in the argument of question 3 that courts are not qualified to adjudicate a case by a judge trial, when evaluation of engineering qualifications are needed. **So, the summary judgment was not appropriate.[2]**

7. Whether the qualifications of candidates for which the district courts are not qualified to make judgments by judge trials should be precluded pursuant to Rule 56.

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[1] And there is no circumstantial evidence when the two allegations: (i) A less qualified person was hired and (ii) I was unlawfully discriminated because I belong to the protected group by virtue of my age. These two allegations are established from documentary evidence.

[2] More reasons will be found in secion presenting compelling reasons.

(1). It is obvious.

(2). Qualifications of candidates are genuine issues of material facts. Therefore, they are precluded pursuant to Federal Rules of Civil Procedure 56.

8. Whether the courts are as discriminatory as the employers for whom laws were enacted.

From my experience I find that courts are as discriminatory as the employers are. In this case and in all my cases from coast to coast I have produced evidence such as exh._6_, yet the courts have dismissed my cases. In many of the cases the courts have taken recourse to unlawful actions, such obstruction of justice, concealment of truth, perjury and fraud. This observation is of national importance for the Supreme Court or the Congress to take an action. The best remedy by the Supreme Court will be to adopt the previous amendment. Then the courts will be unable to discriminate.

Arguments contd.

Whereas cases of "discrimination in hiring" are very large in number, exh._7_; discrimination on the basis of age, gender, color, race and national origin remains a serious problem for America, exh._8_. Exh._7_ is a list of employers I had applied to over a time period of two years. Exh._8_ is a compilation of **stories** of **how** the United States district courts dismissed all of them erroneously and **how** the appellate courts affirmed all of them erroneously. **All because the courts are making their decisions by judge trials without being qualified to do so.**

VIII. COMPELLING REASONS

(1) Whether the courts possess, should possess, or they are required to possess the necessary expertise to evaluate the qualifications of college graduates? **This is a question of national importance for the Supreme Court to decide.** The Supreme Court decision will not only be important to me .but also to others similarly situated.

Because the courts do not possess the necessary expertise to evaluate the qualifications of college graduates, **they are making erroneous decisions.** In my case they have made erroneous decisions in all the cases. I have given one example, the example of the present case, where the court could not make the decision as to who was better qualified from the comparison of qualifications, vide page 3.

Other examples are:

Example No. 1.

CA No. C96-5720 RJB
ABDUL AZIZ v. SAINT MARTIN'S COLLEGE, WA

The employer advertised for application requirements, which were: (i) An application letter, (ii) A resume, (iii) Copies of transcripts and (iv) Three letters of recommendation.

Exh._6_ shows that I met all the requirements. The selectee did not. Therefore, I was qualified and the selectee disqualified. Yet, I was not hired. Because the court does not possess necessary expertise, it erred.

Example No. 2.

C. A. No. 1:97-CV-1018
ABDUL AZIZ v. PENN STATE UNIVERSITY,

YORK CAMPUS

The case was filed in 1995. It is still pending. No final judgment has yet been mailed. According to the employer, **York Campus,** and the court (i) there were 44 applicants, (ii) only I was qualified, and (iii) none else was. The court could not yet decide the case **because the court does not possess necessary expertise.**

Example No. 3

This is a case of age discrimination only.[3]

C. A. No. 97-1134
ABDUL AZIZ v. PENN STATE UNIVERSITY
BERKS CAMPUS,

The position was advertised for a mechanical engineer at the Berks Campus. I was a mechanical engineer. I was not hired. The employer hired a manufacturing engineer. The court, even, did not know the difference between a mechanical engineer and a manufacturing engineer. **Because the court does not possess necessary expertise, it erred. And** because the appellate court also does not possess necessary expertise, it affirmed.

Example No. 4

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[3] I have also a case against this employer for race and natonal origin

This is a case of race and national origin discrimination.

C.A. No. 98-6079
ABDUL AZIZ v, PENN STATE UNIVERSITY,
BERKS CAMPUS

1. I filed this discrimination complaint on 11-15-98.
2. I requested for issue summons on 12-5-98.
3. I requested for issue of summons by certified mail on 1-7-99.
4. I requested the Circuit Court Executive to take appropriate action on 2-7-99. He advised me to write to the Chief Judge of the district court.
5. I wrote to the Chief Judge immediately. The Chief Judge did not respond.

In this case, the chief judge and the circuit executive could not take any action **because they do not possess necessary expertise either to be able to do so.**

Example No. 5

C.A. No. 96 C 286
ABDUL AZIZ v. TRI-STATE UNIVERSITY,

Advertised required qualifications required were: A Ph.D., Industrial Experience and Experiences in Solid Mechanics. I had all these three. Selectee had a Ph.D. but no Industrial Experiences and no Solid Mechanics Experiences, yet I was not hired. **Because the court does not possess necessary expertise, it erred. And** because the appellate court also does not possess necessary expertise, it affirmed.

Example No. 6

C. A. No. 96-2716

Abdul Aziz v. Rodney E. Slater
Secretary of Transportation

In this case the employer was the United States Coast Guard Academy in New London, Connecticut in the Department of Transportation. The qualifications advertised were: "Applicants must possess a Master degree in Mechanical Engineering or a related field, A Ph.D. degree, college-level teaching and engineering experience in industry are preferred. I had a Ph.D., more than 20 years of engineering experience in industry and more than 6 years college-level teaching experience. Selectee had a Master's degree, no engineering experience in industry and no college-level teaching experience. Yet, I did not get the job. **Because the court does not possess necessary expertise, it erred. And** because the appellate court also does not possess necessary expertise, it affirmed.

(i). That the courts do not possess necessary technical expertise, and they err is the first question of national importance for the Supreme Court to decide.

(ii) Therefore, in such civil actions the district courts must not decide them by judge trials, but must decide them by jury trials. This is the solution, a legitimate legal alternative. If this solution is not adopted, then justice will be denied to Minorities for ever. This is also a compelling reason.

(iii) It is also of national importance of having the Supreme Court decide other questions involved, because **all** courts are making the same erroneous decisions for the same reasons in **all** cases since 1967. It is a national problem.

(iv) In all the discrimination complaints in hiring, a plaintiff claims that he/she was better qualified, the

defendant claims that he/she was not. This is a great dispute for the Supreme Court to decide. The issue for the Supreme Court is not to decide, who was better qualified, but to decide why the dispute exists. **It is a compelling reason for the Supreme Court to grant the writ so that this issue will be decided once for all, a vital interest to the United States.**

(2) Another compelling reason is that this appellate court decision is in conflict with many other appellate courts decisions. For examples:

Standard 1.

Summary judgment is appropriate only when there is no issue of material facts, so that the dispute may be decided solely on legal grounds. Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987.

But in this case there is issue of material facts such as "Who was better qualified?" and "Did the plaintiff belong to the protected group?" So, summary judgment was not appropriate.
Therefore, the 4th circuit's decision is in conflict with the 8th circuit's decision.

Standard 2.

Only disputes over facts that may affect outcome of the suit under the governing law will properly preclude the summary judgment. *Anderson*, 477 U.S. at 248

Clearly, the dispute over the above fact[4] will affect the outcome of the suit. Therefore, summary judgment in this case should have been properly precluded.

Standard 3.

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[4] the courts do not possess, should not possess, or they are not required to possess the expertise to evaluate the qualifications of college graduates

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully so that no person will be improperly deprived of a trial of disputed factual issues. Inland Oil & Transport Co. v. United States, 600 F.2d 725 (8th Cir, 1979), cert. denied, 444 U. S. 991 (1979)

The above two issues, who was better qualified and did plaintiff belong to a protected group are not disputed factual issues. Therefore, summary judgment should not have been granted. So, the 4th circuit is in conflict with the 8th Cir. in not invoking summary judgment carefully. On the other hand if these two factual issues were disputed, then there would exist a dispute, And as long as there is a dispute, a case can not be dismissed.

Standard 4.

In considering a summary judgment standard motion, the court is required to accept as true all evidence presented by the non-moving party, and to draw all justifiable inferences from such evidence in that party's favor. Id. at 255.

In a summary judgment motion the defendant is the moving party and the plaintiff is the non-moving party.

According to the above standard the court is required to accept as true all evidence[5] and draw all justifiable inferences from such evidence. Using **this** summary judgment a plaintiff may win. If he/she does, the defendant still has a second chance, i.e.., the trial. At trial the investigation is very thorough. If the defendant did not **really unlawfully** discriminate the plaintiff, defendant would have won at trial.

On the other hand if the plaintiff's evidence is not accepted as true he/she may lose, then he/she will never get a second

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[5] but not if they are not evidence

chance. But according to the above summary judgment standard if the evidence of plaintiff is accepted as true, then he gets a second chance at trial[6] This standard removes the inherent inequality between the plaintiff and the defendant in protecting their rights during summary judgment adjudication.

Thus, this standard gives equal opportunities to both parties.

This interpretation is my innovation from creative thinking and I submit it to the Hon. Supreme Court.

Standard 5.

The court must accept as true all of the allegations in the pleadings and must give the plaintiff the benefit of every favorable inference that can be drawn from those allegations. Schrob v. Catterson 948 F.2d 1402, 1405 (3d Cir. 1991); Markowitz v. Northwest Land Co., 906 F.2d, 100, (3rd Cir 1990).

The district court did not accept my allegations as true. My allegations were (i) I was better qualified and (ii) I belong to the protected group by virtue of age. Had it not done so, it would submit the case to a jury trial. I would then have an equal opportunity to win.

Standard 6.

The burden is on the moving party is to show that the record does not disclose a genuine dispute on a material fact. Counts v, M.K. Ferguson Co., 862 F.2d 1338 (8th Cir. 1988).

A material fact is a relevant fact. That I was better qualified is a relevant fact, because this enters in to the litigation. Defendant did not show that there was no dispute on this material fact..

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[6] this philosophy is in consistence with the Supreme Court opinion on Rule 56(c).

Standard 7

Supreme Court Opinion on FRCP 56 (c) says,

> The plain language of Rule 56(c) mandates the entry of summary judgement, after adequate time for discovery and upon motion, against a party who fails to make sufficient showing to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof **at trial**. In such a situation, there can be 'no genuine issue as to any material fact'.

Defendant failed to show that plaintiff failed "to make

sufficient showing to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof **at trial**."

Standard 8.

In appraising the sufficiency of the complaint, we follow, of course, the accepted rule, that a complaint should not be dismissed for the failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts to support his claim that would entitle him to a relief.

Defendant did not show that "it appears beyond doubt that the plaintiff can prove no set of facts to support his claim that would entitle him to a relief."

Standard 9.

A complaint is properly dismissed only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim [at trial] which will entitle him to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3rd Cir. 1988).

Defendant did not show that "it appears certain that the plaintiff cannot prove any set of facts in support of his claim [at trial] which will entitle him to relief."

I have shown eight examples of cases where the 4th Circuit

decision is in conflict with other circuit decisions. From these examples I **also** conclude that

THE SUMMARY JUDGMENT WAS NOT APPROPRIATE

(3) If the Hon. Supreme Court delivers the suggested amendment[7] as its opinion, controversy surrounding the use of the direct method will be greatly minimized, and the adjudication of "discrimination complaints in hiring" **will be much shorter and quicker.**

(4) Another compelling reason is the following:

Though the petitioner filed for rehearing en banc, no member of the appellate court or the panel requested a poll on the petition for rehearing en banc, and the panel considered the petition for rehearing only, exh._10_, page 22a. It did not consider my complaint and defendant's response thereto. Since it did not consider my complaint, it did not consider that I was better qualified and that I belong to the protected group by age. **Therefore, the appellate court en banc has violated the ADEA of 1967, as amended and I was unlawfully discriminated.** I believe it is of national importance for the Supreme Court to stop such unlawful discrimination.

(5) The most important compelling reason is the following:

Chronologically speaking, the African people were slaves until President Abraham Lincoln emancipated them from slavery. Then came Rev. Martin Luther King Jr., who with the help of President Lyndon B. Johnson, enacted the Civil Rights Act of 1964. Title VII of this Act gives equal oppor-

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[7] Vide discussion on fourth question presented on page 4.

tunity in employment irrespective of color, race, national origin, religion and gender. The Congress further enacted Age Discrimination in Employment Act of 1967. Both acts were amended in 1997. If the Supreme Court accepts the two proposed amendments by the petitioner, the situation will further improve making it **the most important compelling reason.**

IX. ANSWER TO THE DISTRICT COURT

The district court could not dismiss my complaint if the employer did not adopt unlawful means. For examples:

1. The employer advertised 12 qualifications, exh._2 & 3_, but presented only the following 4 qualifications to the court as shown below.

"(1) selectee was a registered professional engineer; plaintiff was not, (2) selectee had relevant experience in mining and machine tools technology; plaintiff did not, (3) selectee resided and worked in this region for fifteen years, plaintiff had only been in West Virginia once prior to his deposition, and, (4) selectee was previously employed by the college as an adjunct professor, plaintiff was not."

(1) is false because exh._5_ shows that selectee was not a registered professional engineer. (4) is also false because selectee was a graduate assistant and not an adjunct professor; teaching mathematics, not mechanical engineering. (2), (3) and (4) were not advertised at all. Vide exhs._2 & 3_. And that is not all, the district court judge has deliberately overlooked a document like exh._6_ and accepted statements like (1), (2), (3) and (4) as true,

The district court has cited Rule 56(c), but has not shown, as a matter of law, that there is no genuine issue.

Instead of citing the Supreme Court opinion[8], the court cited the following:

The moving party has the burden of establishing that there is no genuine issue as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This burden can be met by showing that the nonmoving party has failed to prove an essential element of the nonmoving party's case for which the nonmoving party will bear the burden of proof at trial. Id. at 322. If the moving party meets this burden, according to the United States Supreme Court, "there can be 'no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Defendant did not show that plaintiff has failed "to prove an essential element of the nonmoving party's case for which the nonmoving party will bear the burden of proof at trial.

In the **Analysis,** the court says,

Defendant claims that plaintiff cannot make a prima facie case showing age discrimination or that, even if he can, there was a legitimate nondiscriminatory reason for not hiring Dr. Aziz.

Plaintiff has met all the four prima facie criteria of discrimination. (i) Defendant advertised the position, (ii) Plaintiff applied, (iii) He was not hired, (iv) He was a member of the protected group.

The court goes on to say:

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[8] Supreme Court opinion, stadard 7 on page 17

The plaintiff may meet this burden in two ways. First, the plaintiff may use direct or indirect evidence under ordinary principles of proof. See Henson, 61 F.3d at 274. Second, the plaintiff may rely on the proof scheme developed in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) , and its progeny.

Plaintiff has used direct evidence, ie., the ADEA of 1967, as amended. Nothing can be more direct than the law itself.

The court continues:

(i) The plaintiff, in his pleadings with the court filed January 4 and March 8, 1999, contends that he does not seek to vindicate his claim under the McDonnell Douglas Framework, but would rather proceed using the traditional method of direct proof. So be it.

Please note the use of the phrase, "So be it." [9] Even though the court said so, it used the McDonnell Douglas Framework, without manifesting the name. Though, the court says. "So. be it", it did not act accordingly. It used the invalid McDonnell Douglas Framework.

The district court says:

Once the employer articulates a legitimate non-discriminatory business reason for its action, any presumption of discrimination drops from the case, and the burden of persuasion rests squarely on the plaintiff." Wilson v. Firestone Tire & Rubber Co 932 F.2d 510, 514 (6th Cir. 1991) (citations omitted).

The above ruling is similar to the McDonnell Douglas Framework and, therefore, is not valid.

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[9] the court used this phrase very unwillingly. It may be inferred that the court was biased.

The district court says:
Plaintiff has advanced absolutely no direct evidence of age discrimination other than the fact that plaintiff was sixty-three years old and selectee was forty-eight when the hiring decision was made. Once a plaintiff fails to provide direct evidence of discriminatory intent in an age discrimination case, his only recourse is the McDonnell-Douglas framework.

The petitioner was better qualified. He belongs to the protected group by virtue of his age. He was not hired. This is the direct evidence of age discrimination.
The district court is creating an argument. It is not the responsibility of the district court to create an argument with a party, but the responsibility of the district court is to resolve the parties' disputes as a matter of law.

The district court further says:

Because plaintiff has failed to meet his burden, the court need not continue with the analysis.

In the summary judgment the defendant is the moving party and it carries the burden, and not the plaintiff.

The continues to say:

However, the defendant claims, and has offered evidence, that the selectee was better qualified for the following reasons: (1) selectee was a registered professional engineer; plaintiff was not, (2) selectee had relevant experience in mining and machine tools technology; plaintiff did not, (3) selectee resided and worked in the region for fifteen years; plaintiff had only been in West Virginia once prior to his deposition, and, (4) selectee had previously been employed by the college as an adjunct professor; plaintiff had not.
Statement (1) above is a false statement, exh.5. Statements

(3) and (4) are discriminatory, because with these two qualification requirements, there is only one candidate in the United States. The statement (2) is also untrue. Selectee's resume does not say so.[10]

The court continues:

Plaintiff contests the legitimacy or accuracy of these reasons. Plaintiff argues that the selectee was not actually a registered professional engineer at the time the decision was made, but was awaiting certification. In addition plaintiff argues that the other reasons given were not advertised and, thus, can not be considered. Many legitimate factors go into hiring decisions and not every single one must be articulated in a job notice. In addition, the fact that the selectee was awaiting formal certification is irrelevant to this analysis. "but was awaiting certification" was not my statement anywhere, the court inserted this statement falsely.

The court continues:

It is not this court's role to evaluate the wisdom of an employer's criteria, or the weight that the employer should place on them, provided that they do not reflect a discriminatory purpose. See EEOC V. Clay Printing Co, 955 F'.2d 936, 946 (4th Cir. 1992). This court fails to see any discriminatory purpose in the factors articulated by Bluefield State College

The court failed to see that the following are discriminatory.

(3) selectee resided and worked in the region for fifteen years; plaintiff had only been in West Virginia once prior to his

---

[10] On the other hand, though not mentioned in the one page resume, plaintiff had 2 years of part time machine tools experience working for the Simons Machine Tools Corp. in Albany, NY.

deposition, and, (4) selectee had previously been employed by the college as an adjunct professor; plaintiff had not.

With these two qualifications none, but the selectee, in the whole United States would get the job. Nothing could be more discriminatory than these two qualification requirements.

The courts conclusion:

In sum, the plaintiff has failed to present any direct evidence of a discriminatory purpose for defendant's hiring decision. In addition, defendant has demonstrated legitimate, nondiscriminatory reasons for its decision. Accordingly, a separate Judgment Order of even date herewith will be entered.

The petitionerdisputes this conclusion. As long as there was a dispute, the plaintiff's case could not be dismissed by a summary judgment.

THEREFORE, THE SUMMARY DISMISSAL WAS NOT APPROPRIATE

These are the ways the district court made the erroneous decision.

X. ANSWER TO THE COURT OF APPEALS

In its per curiam opinion, the court of appeals says, "We have reviewed the record and the district court's opinion and find no reversible error." I did not complain for a reversible error pursuant to Rule 60(b)(6). I filed a complaint pursuant

to ADEA of 1967. Under ADEA of 1967, I alleged that (i) a less qualified person was hired and (ii) I belong to the protected group. Neither the district court nor the appellate court addressed and resolved these two allegations.

Therefore, both the district court and the appellate court have violated the law, "ADEA of 1967, as amended." The appellate court has not only violated the law but also came out with an alibi

The court of appeals proudly says, "We grant his motion to file an addendum." I filed an addendum and claimed the following exactly as it advised.

A material fact was overlooked in the decision. A law was overlooked in the decision. The opinion is in conflict with decision of the United States Supreme Court. The opinion is in conflict with a decision of other courts of appeals. The

conflict is not addressed in the opinion. The proceeding involves one or more questions of exceptional importance. **But the court of appeals did not address any one of the above.**

These are the ways the appellate court decision was erroneous.

XI. CONCLUSION

1. I was better qualified, exh._6_.[11] I belong to the protected group exh._4_.[12] So, I should have been hired. But I was not. **Therefore, I was unlawfully discriminated.**

---

[11]indisputable

[12]also indisputable.

2. Because the courts do not possess the qualifications they need, they are making erroneous decisions. They have been making such decisions since the enactment of the laws, and if not stopped, they will be making similar decisions for all time to come.

3. If unlawful discrimination is not eliminated from America there will never be racial harmony in America.

4. If two proposed amendments are adopted existing loopholes and weakness will be eliminated. It will greatly benefit all American Minorities.

IX. PRAYERS

WHEREFORE, for all the foregoing reasons this humble petitioner prays that this Honorable United States Supreme Court grant petitioner's writ of certiorari **adopting the two proposed amendments, one for discrimination in hiring and the other for precluding the candidates' qualifications[13] pursuant to Fed. Rules of Civil Proc. 56.**

Respectfully submitted,

ma aziz 12-27-99 Phone: 301-528-0241

Abdul Aziz, Ph.D., Petitioner Pro se, 19924 Lake Park Drive, Gemantown, MD 20874-101

[13] for which the districts court are not qualified to make judgments by judge trials

APPENDIX OF EXHIBITS

Exhibit Nos.	Page Nos.
1	1a
2	2a
3	3a
4	4a
5	5a
6	7a
7	8a
8	10a

EXHIBIT 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1502

ABDUL AZIZ,

Plaintiff-Apellant,

versus

BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM OF WEST VIRGINIA

Defendant-Appellee,

and

BLUEFIELD STATE COLLEGE,

Defendant,

Appeal from the United States District Court for the Southern district of West Virginia, at Bluefield. David A Faber, District Judge. (CA-96-2025-1)

Submitted: August 31, 1999 Decided: September 21,1999

Before ERVIN,[13] LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

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[13] Judge Ervin participated in consideration of the case but died prior to the time the decision was filed. The decision was filed by a quorum of the panel pursuant to 28 U. S. C. § 46 (d).

Abdul Aziz, Appellant Pro se. Charles R. Bailey, SHUMAN, ANNAND, BAILEY, WYANT & CHARLES, West Virginia, for Appellee.

Unpublished opinions are not binding preceding in this circuit. See Local Rule 36(c).

PER CURIAM

Abdul Aziz appeals the district court's order granting summary judgment in his action against the Board of Directors of the State College System of West Virginia. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Aziz v. Board of Directors of the State College System of West Virginia, No. CA-96-2025-1 (S.D.W. Va. Apr. 2, 1999.) We grant his motion to file his addendum to his brief. We dispense with oral arguments because the facts and the legal contentions are adequately are presented in the materials before the court and argument would not aid the decisional process.

EXHIBIT 2

EMPLOYER'S NATIONAL ADVERTISEMENT OF THE POSITION [14]

Bluefield State College is a four-year state college serving South Central West Virginia. Blue field state College has emerged as a four-year state supported commuter college with a primary thrust in the direction of career and technical two and four year programs. The

---

[14] Annotated.. The advertised qualifications are annotated by circled numbers corresponding to the qualification number in exh._6_.

liberal arts offering of the college are focused to enhance its unique mission .The college offers baccalaureate and associate degrees and certificate programs. Instructional programs are offered in engineering technologies, business, teacher education, arts and sciences, nursing and health science profession, and a variety of career fields. Students may also complete the nontraditional Regents Bachelor of Arts Degree through Blue field State. A strength of the college is the two plus two ☛❶design of many of its baccalaureate level programs whereby the two years completed for an associate degree are completely applicable toward a baccalaureate degree. Bluefield State College seeks applications for an assistant/associate professor in mechanical engineering technogy beginning Aug. 17, 1995. Duties include **teaching courses in mechanical engineering technology and in support courses in other programs** ☛❶ Other duties include **teaching laboratory** ☛❶ sections and **advising** ☛❶. **MSME** ☛①or MS in closely related field with **a minimum of 15 graduate hours** in mechanical engineering required ☛②; **three years of relevant industrial experience** required ☛③; **professional registration** ☛④and **teaching experience preferred** ☛⑤

EXHIBIT 3

Internal Advertisement

Assistant/Associate Professor in Mechanical Engineering Technology

Bluefield State College seeks applicants for an Assistant/Associate professor in mechanical engineering technology beginning August 17, 1995. Duties include teaching courses in mechanical engineering technology and in support courses in other programs. Other duties include teaching laboratory sections and advising. MIME or MS in closely related field with a minimum of 15 grduate semester hours in mechanical engineering required; three years of relevant industrial experience required; professional registration and teaching experience preferred. Salary commensurate with qualifications. Review of application will begin April 30, 1995 and will continue until the position is filled. Apply to the Director of Human Resources, Bluefield State College, 219 Rock St. Bluefield, WV 24701, AA/EOE.

EXHIBIT 4

Plaintiff's One page Resume for a Faculty Position

PERSONAL

Name: Abdul Aziz
Address: 9222 Edmonston Road
Greenbelt, MD 20770
Phone: 301-513-9164
Citizenship: U.S.A
Born: In India
Marital Status: Married Health Good
Work Habit: Hard worker for long hours

EDUCATION:

BSME, Bangladesh University GPA 3.96
MSME, Michigan State University GPA 3.5
Ph.D. ME, University of Maryland GPA 3.70
Ph.D. in 1972
21 graduate hours in Mathematics

WORK EXPERIENCE:

Industrial:

Vapor Heating Corporation., Chicago, IL. 2½ years. Project Engineer. Research, Development and Design in water tube boilers and heat exchangers

General Electric Company, Schenectady, NY 2 ½ years. Development Engineer. Research, Development and Design in large steam turbines, gas turbines and their components.

Martin Marietta Aerospace Corp., Orlando, FL. Staff Engineer. Research, Development and Design in missiles, air crafts and ground support equipment

Government:

Naval Research Laboratory, Washington, D.C. 12 years. Mechanical Engineer, Research Mechanical Engineer and Supervisory Mechanical Engineer. Research, Development an Design in Mechanical and Aerospace Engineering.

TEACHING

Full Time

Hudson Valley Community College, Troy, NY 2 years. Associate Professor. Teaching Mechanical Engineering Technology Courses such as mechanical drawing, solid mechanics, machine design, automotive engineering, thermodynamics, mathematics, physics, industrial hydraulics, manufacturing processes.

Youngstown State University, School of Technology Youngstown, OH. 4 years. Assistant Professor in Mechanical Engineering Technology, teaching statics, dynamics, thermodynamics, heat transfer. kinematics, mechanisms, physical measurements. Basic Computer programming and problem techniques.

Part time

Illinois Institute of Technology, Chicago, IL. Internal Combustion Engines. One semester.
Northwest University, Evanston, IL. Mathematics, graduate and undergraduate. 2 years.
George Washington University. Graduate Mathematics.
University of Maryland. Statics.

EXHIBIT 5

AKHTAR H. SAFDER
564 QUAIL VALLEY
PRINCETON, WV 24740

(304) 425-0304

EDUCATIONAL

1964-1970: Bachelor of Mechanical Engineering, Osmania University, India. During this course I did all the basic engineering courses. Completed in FIRST CLASS.

1971-1973: Master of Mechanical Engineering, City University of New York, N. Y. Completed with almost 3.5 grade point average.

1978 : Completed the requirements and passed the examination of Registered Professional Engineer in the State of West Virginia. The certification is filed for reinstatement.

EXPERIENCE:

6/94 to Present: Consulting Mechanical Engineer - Consulting work on mechanical engineering design projects from conception until the completion. Help the Product Engineers by checking their design work. Worked in Miners and Boring Machines. EMICO Coal Machinery Company.

11/84 to 5/94: Worked as a Private Engineer looking after maintenance of Boilers, Electrical works, plumbing works and other structural work of residential buildings and total engineering decisions was my responsibilities. Managed the maintenance up to 1000 units.

2/76 to 10/84: Chief Mechanical Engineer. In charge of Rail/Belt equipment for underground mines. Design of equipment and presentation of products to customers, processing of sales orders, total management and control of product lines. Baker International - WV Mining Equipment Company.

Teaching: Taught Technical Mathematics at Bluefield State College under Mr. Clingensmith in the late 70's and now under Frank Hart since Fall '94.

General: U.S. Citizen. Married. 3 children, residing in Princeton/Bluefield area since 1978.

EXHIBIT 6

COMPARISON OF QUALIFICATIONS

Required qualifications:

No. 1. Minimum degree required: An MSME.: I have a Ph.D. **Selectee has not.**

No. 2. Minimum 15 graduate semester hours required in M.E. I have more than 60 graduate semester hours, **selectee has less than 24.**

No. 3. Three years of relevant industrial experience required:
I have more than 20 years of relevant experience, **selectee has less than that.**

Preferred qualifications:

No. 4. Professional registration **preferred**:
None of us has, exhs. _4_ &_5_.

No. 5. Teaching experience **preferred**:

I have 6 years, selectee has none.

No. 6. The advertisement, exh.2, calls for

experience in teaching mechanical engineering **2 + 2** program. I have 4 years of teaching mechanical engineering **2+2** program. **Selectee has none.**

Desirable qualifications are

No. 7. Courses to be taught in mechanical engineering technology:
I have taught more than 13 courses, **exh. 4. Selectee has none, exh 5.**

No. 8. Advising: I have 4 years of advising, **Selectee has none.**

No. 9. Teaching Laboratory: I have taught for 6 years,* **selectee has for none.**

No. 10. University Services: I have 4 years,* **Selectee has none.**

No. 11. Maintaining office hours: I have maintained 10,* **selectee has none.**

No. 12. I have 4 years of service in Faculty Committees,* **selectee has none.**

---

* Exhibit 2.

EXHIBIT 7

A Partial List of The Employers I applied to:

1. Boward Community College, FL. 2. Alamo Community

College District, TX. 3. Edison Community College, OH. 4. Bluefield State College, WV. 5. Arrowhead Community College. MN. 6. Dekalb College, GA. 7. Chattanoga Community College, TN. 8. Miami Dade Community College, FL. 9. Austin Community College, TX. 10. Columbia Basin College, WA. 11. Cerritos Community College. CA. 12. Central Florida Community College, FL. 13. Bevard Community College, FL. 14. Florida Keys Community College, FL. 15. Florida Comm College at Jacksonville, FL. 16. Eastern Mediterranean University, Cyprus. 17. Arizona State University, AZ. 18. Carnegie Mellon University, PA. 19. Northern Arizona University, AZ. 20. Bethany College, WV. 21. Howard Community College, MD.

22. Horray Georgetown Technical College, CA. 23. Lake Sumter Community College, FL. 24. Hillsborough Community College, FL. 25. Laredo Community College, Texas. 26. Green River Community College, WA. 27. Highline Com munity College, WA. 28. Hudson Community College, NJ. 29. Georgia Institute of technology, GA. 30. Hofstra University, NY. 31. Penn State York Campus, PA. 32. Pennsylvania State University, PA. 33. New England Institute of Technology, RI. 34. State Tech Inst at Memphis, TN. 35. New Jersey Institute of Technology, NJ. 36. Moltow State Community College, TN. 37. The College of the Marshall Islands, MH. 38. Marist College, NY. 39. Wilbur Right College, IL. 40. Valencia Comm. Coll. FL.

41. State University of New York, Morrison. 42. State University of New York, Stony Brook. 43. St. Martin's College, WA. 44. Valparasio University, IN. 45. South Texas Community College, TX. 46. San Joaquin Delta College, CA. 47. 48. Tri-State Univ., IN. 49. Seatle Community Coll. WA 50. Shoreline Comm Coll. WA. 51.Xavier University, LA. 52. Univ of N. Dakota, ND. 53.Youngstown State Univ.OH

54. Arkansas State Univ. 55. North Arizona Univ. AZ
56. Coast Guard Academy CT. 57. Cleveland Sate U, OH.
58. King Fahd U, Saudi.Arabia. 59. Grove City Coll. N.J.
60. West Virginia U. WV. 61. Metro State Coll., Denver.
62. University of Denver, CO.

EXHIBIT 8

UNITED SATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 25, 1999

No. 99-1502
CA-96-2025-1

ABDUL AZIZ,

Plaintiff-Appelant,

v.

BOARD OF DIRECTORS OF THE
STATE COLLEGE OF WEST VIRGINIA,

Defendant-Appellee

and

BLUEFIELD STATE COLLEGE,

Defendant.

On petition for Rehearing and Rehearing En Banc

The appellant's petition for hearing and rehearing en banc was submitted to this court. As no member of this court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for hearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

The denial of rehearing is entered by a quorum of the panel pursuant to 28 U.S.C. Section 46(d).

For the Court
/s/ Patricia S. Connor, CLERK

EXHIBIT 9

ENTERED
APR 2 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

ABDUL AZIZ,
Plaintiff,
v. CIVIL ACTION NO. 1:96-2025

BOARD OF DIRECTORS OF THE
STATE COLLEGE SYSTEM OF
WEST VIRGINIA,
Defendant.

MEMORANDUM OPINION

Currently pending before the court is defendant's motion for summary judgment filed September 8, 1998. After an extension, plaintiff filed a response to the motion and an addendum to the response on December 14, 1998.

Defendant replied on December 29, 1998. Plaintiff filed a rebuttal on January 4, 1999, a further addendum on January 11, 1999, a motion for expedited judgment on January 20, 1999, a motion suggesting a verdict with an attached amicus curiae brief filed in the Eighth Circuit case, Jones V Clinton, No. 98-3371, on January 28, 1999, and an additional response on the summary judgment motion on March 8, 1999. In addition, plaintiff filed numerous reminders with the court that his case is pending.

Defendant argues that plaintiff has tailed to demonstrate a prima facie case of age discrimination or, if he has, defendant has articulated a legitimate nondiscriminatory reason for its action.

Background

Dr. Abdul Aziz applied for a position as a faculty member in the Mechanical Engineering Technology Department at Bluefleld State College. Dr. Aziz was not selected for this position. At the time of the complaint Dr. Aziz was sixty-three years old and the selectee was forty-eight. Aziz filed this suit initially against Bluefield State College under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1998), which precludes employment discrimination on the basis of age. The appropriate party, Board of Directors of the State College System of West Virginia now defends in this action.

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides:

> The judgment sought shall be rendered forthwith if

> pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the burden of establishing that there is no genuine issue as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This burden can be met by showing that the nonmoving party has failed to prove an essential element of the nonmoving party's case for which the nonmoving party will bear the burden of proof at trial. Id. at 322. If the moving party meets this burden, according to the United States Supreme Court, "there can be 'no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Once the moving party has met this burden, the burden shifts to the nonmoving party to produce sufficient evidence for a jury to return a verdict for that party. . . .

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find, by a preponderance of the evidence, that the plaintiff is entitled to a verdict.....

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 250-51.

Analysis

Defendant claims that plaintiff cannot make a prima facie case showing age discrimination or that, even if he can,

there was a legitimate nondiscriminatory reason for not hiring Dr. Aziz.

A plaintiff may prove a discrimination claim under the ADEA by meeting the '1 but for" test or the "mixed motive" test. See Henson v Liggett Group. Inc., 61 F.3d 270, 274 (4th Cir. 1995); Russell v. Microdyne, 65 F.3d 1229 (4th Cir. 1995); Conkwright v Westinghouse Elec Corp., 933 F.2d 231, 233 (4th Cir. 1991); EEOC V. Western Elec. Co.. Inc., 713 F.2d 1011, 1014 (4th Cir. 1983); Price-Waterhouse v. Hopkins, 490 U.S. 228, 240-242 (1989); Smith v. University of North Carolina, 632 F.2d 316, 337 (4th Cir. 1980) (applying motivating factor test to ADEA claims) . Under the "but for" test, the plaintiff must show that he would have been hired "but for" his employer's discriminatory intent. See Henson, 61 F.3d at 274; Conkwright, 933 F.2d at 233; Western Elec. Co.. Inc. 713 F.2d at 1014. The plaintiff may meet this burden in two ways. First, the plaintiff may use direct or indirect evidence under ordinary principles of proof. See Henson, 61 F.3d at 274. Second, the plaintiff may rely on the proof scheme developed in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) , and its progeny.

This court originally decided this case on summary judgment in defendant's favor in an Order entered November 4, 1998, after plaintiff failed to respond to defendant's motion. The plaintiff then notified the court that he had not received defendant's motion and that is why he failed to respond. (Pl.'s Resp. of Nov. 12, 1998). Thereafter, the court vacated its judgment order to provide plaintiff an opportunity to respond. In this court's original summary judgment order, the McDonnell--Douglas scheme was applied to the pleadings. The plaintiff, in his pleadings with the court filed January 4 and March 8, 1999, contends that he does not seek to vindicate his claim under the McDonnell

Douglas framework, but would rather proceed using the traditional method of direct proof. So be it.

Plaintiff's allegations amount to an argument that he is better qualified, but older, than the person selected for the position. Plaintiff has developed his own elaborate system of comparing his qualifications to those of the selectee in an effort to prove his claim. (Compl. at 7-8.) This court found that for purposes of a motion to dismiss, this was sufficient to state a claim. However, plaintiff's testimony in deposition and his answers to interrogatories still only demonstrate that the basis for his claim is the age disparity between himself and the selectee and his own methodology for evaluating the respective candidacies. (Pl.'s Mem. Ex.s A, F & G.). Still, plaintiff maintains that the reason he was not hired was direct age discrimination.

Under the direct proof method, "(a] plaintiff who brings a claim under the ADEA must prove that age was a determining factor in the adverse action that the employer took against him. Once the employer articulates a legitimate, non-discriminatory business reason for its action, any presumption of discrimination drops from the case, and the burden of persuasion rests squarely on the plaintiff." Wilson v. Firestone Tire & Rubber Co 932 F.2d 510, 514 (6th Cir. 1991) (citations omitted) . Plaintiff has advanced absolutely no direct evidence of age discrimination other than the fact that plaintiff was sixty-three years old and selectee was forty-eight when the hiring decision was made. Once a plaintiff fails to provide direct evidence of discriminatory intent in an age discrimination case, his only recourse is the McDonnell-Douglas framework which the plaintiff in court filings rejects as illegitimate and illegal. See Henson, 61 F.3d at 274 ("Because [plaintiff] admits that she has no direct evidence of Liggett's intent to discriminate against her on the basis of her age or her eligibility for retirement benefits, she

relies upon the indirect, burden-shifting method of proof developed in McDonnell Douglas ....."); (Pl.'s Add'l Pleading *passim*.)

Because plaintiff has failed to meet his burden, the court need not continue with the analysis. However, even if plaintiff had shown some shred of direct evidence of age discrimination, the reason advanced by Bluefield State College for not selecting Dr. Aziz is that the selectee was better qualified. Defendant admits that both candidates were minimally qualified for the position. However, the defendant claims, and has offered evidence, that the selectee was better qualified for the following reasons: (1) selectee was a registered professional engineer; plaintiff was not, (2) selectee had relevant experience in mining and machine tools technology; plaintiff did not, (3) selectee resided and worked in the region for fifteen years; plaintiff had only been in West Virginia once prior to his deposition, and, (4) selectee had previously been employed by the college as an adjunct professor; plaintiff had not. (Pl.'s Mem. Ex. E, Aff.s of Hart, Mutter, Sage and Kulchar)

Plaintiff contests the legitimacy or accuracy of these reasons. Plaintiff argues that the selectee was not actually a registered professional engineer at the time the decision was made, but was awaiting certification. In addition1 plaintiff argues that the other reasons given were not advertised and, thus, can not be considered. Many legitimate factors go into hiring decisions and not every single one must be articulated in a job notice. In addition, the fact that the selectee was awaiting formal certification is irrelevant to this analysis.

It is not this court's role to evaluate the wisdom of an employer's criteria, or the weight that the employer should place on them, provided that they do not reflect a discriminatory purpose. See EEOC V. Clay Printing Co, 955 F'.2d 936, 946 (4th Cir. 1992). This court fails to see any

discriminatory purpose in the factors articulated by Bluefield Stata College

Conclusion

In sum, the plaintiff has failed to present any direct evidence of a discriminatory purpose for defendant's hiring decision. In addition, defendant has demonstrated legitimate, non-discriminatory reasons for its decision. Accordingly, a separate Judgment Order of even date herewith will be entered.

The Clerk is directed to mail copies of this Memorandum Opinion to all counsel of record.

Dated this 2nd day of April, 1999.

ENTER: David A. Faber, United States District Judge

Supreme Court, U.S.
FILED
FEB 2 2000
CLERK

(2)

AN IMPORTANT ADDENDUM DATED 1-20-00
****

No. 99-1129

In the

Supreme Court of the United States

October term, 1999

ABDUL AZIZ,

Petitioner,

v.

BLUEFIELD STATE COLLEGE,

Respondent.

On the petition for a writ of certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

ABDUL AZIZ, Ph. D.
Petitioner pro se
19924 Lake Park Drive
Germantown, MD 20784-1084
Phone: (301) 528-0241

CLERK
FEB 2 2000
FILED
Supreme Court, U.S.

3pp

AN IMPORTANT ADDENDUM

****

The ADEA of 1967 says:

It shall be unlawful for an employer to refuse or fail to hire an individual, despite his/her qualifications, or otherwise to discriminate an individual because the individual belongs to the protected group by virtue of his/her age.

According to the above governing law qualification is an issue. Since this is an issue by law, it is a genuine issue. There can be no room for argument.

Rule 56(c) says:

The judgment shall be rendered forthwith, if the pleadings, depositions, and answers to interrogatories, and the admissions on files, together with affidavits, if any, show that there is no genuine issue as to any material fact as a matter of law, and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court Opinion on Rule 56(c) says:

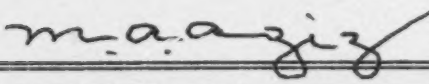
The plain language of Rule 56(c) mandates the entry of summary judgement, after adequate time for discovery and upon motion, against a party who fails to make sufficient showing to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact.

According to the Rule 56(c) substantiated by the Supreme Court Opinion, a defendant shall be awarded a summary judgment in its favor if there is a genuine issue and the defendant is entitled to it as a matter of law. Since there is no genuine issue in the case of employment hiring discrimination,

the defendant cannot be awarded the summary judgment as a matter of law. There is no room for argument.

This genuine issue in the case of employment hiring discrimination is an issue of utmost national importance, because a Supreme Court Opinion, agaist summary judgment in the case of employment hiring discrimination, will stop hiring discrimination for ever. It will be a justice done to millions of minorities of the United States for which Lincoln and King died and for which the laws were enacted. Most important is that no courts so far including the S upreme Court could deliver any rulings that would completely eliminate hiring discrimination.

Respectfully submitted,



1-21-00 301-528-0241

Abdul Aziz, Ph.D., Appellant Pro se, 19924 Lake Park Drive, Gemantown, MD 20874-1084

Supreme Court, U.S.
FILED
FEB 04 2000
CLERK

No. 99-1129

In The

Supreme Court of the United States

ABDUL AZIZ,

Petitioner,

v.

BOARD OF DIRECTORS of the STATE COLLEGE SYSTEM of WEST VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States District Court For The Southern District Of West Virginia At Bluefield

BRIEF IN OPPOSITION

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(304) 345-4222

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13PP

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit properly affirmed the United States District Court for the Southern District of West Virginia's grant of summary judgment in favor of the Respondent, the Board of Directors of the State College System of West Virginia?

2. Whether Petitioner's claim pursuant to the Age Discrimination in Employment Act of 1976, 81 Stat. 602, as amended, 29 U.S.C. 621 *et seq.* (1994 ed. and Supp. III), should have been dismissed by the United States District Court for the Southern District of West Virginia for a lack of subject matter jurisdiction pursuant to the sovereign immunity conferred by Eleventh Amendment of the United States Constitution?

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STATUTES AND RULES

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JURISDICTION

There is no compelling reason for this Court to grant a Writ of Certiorari to consider the decision of the United States Court of Appeals for the Fourth Circuit to affirm the United States District Court for the Southern District of West Virginia's grant of summary judgment to Respondent, the Board of Directors of the State College System of West Virginia.

STATEMENT OF THE CASE: PROCEDURAL HISTORY

In 1995, the Petitioner, Abdul Aziz, applied for a position as an assistant/associate professor of mechanical engineering at Bluefield State College ("the College"), located in Bluefield, West Virginia. Another applicant was selected to fill the advertised position. The selected applicant was age forty-eight (48), while the Petitioner was age sixty-three (63). Aziz filed suit in the United States District Court for the Southern District of West Virginia, alleging that Respondent, the Board of Directors of the State College System of West Virginia ("the Board") had violated the Age Discrimination in Employment Act of 1976, 81 Stat. 602, as amended, 29 U.S.C. 621 *et seq.* (1994 ed. and Supp. III) ("ADEA"), by failing to hire him.[1]

[1] As Petitioner points out in his Petition for a Writ of Certiorari, he has filed numerous other unsuccessful civil discrimination lawsuits against colleges across the country. In fact, Petitioner boasted during his deposition that his practice of filing lawsuits is a "very ingenious method that no court will ever be able to stop."

Following discovery, the Board filed a motion for summary judgment arguing that Petitioner had failed to establish a prima facie case of age discrimination, or, in the alternative, that the Board had legitimate non-discriminatory reasons for not hiring Dr. Aziz. The United States District Court for the Southern District of West Virginia at Bluefield granted the Board's motion, finding that the Plaintiff had failed to present any direct evidence of a discriminatory purpose for the Board's hiring decision. The Court also based its judgment upon the fact that the Board articulated legitimate, non-discriminatory reasons for its decision not to hire Petitioner. Aziz filed a "Request for Reconsideration" then an "Addendum to Plaintiff's Request for Reconsideration." The District Court denied the petitioner's motion for reconsideration. Following the disposition of his case in federal court, Petitioner filed a complaint in Mercer County Circuit Court, in Mercer County, West Virginia, making virtually identical allegations. He then filed a petition for appeal to the United States Court of Appeals for the Fourth Circuit, alleging that the District Court had erroneously granted the Board's motion for summary judgment. He also filed what he entitled a "Very Important Addendum to His Appeal." In a per curiam, unpublished opinion, the Fourth Circuit Court of Appeals affirmed the decision of the District Court.

ARGUMENT FOR DENYING THE WRIT

A. The District Court applied well-established legal principles governing the ADEA to grant summary judgment for the Board; the United States Court of Appeals properly affirmed the decision.

The Petition for a Writ of Certiorari[2] ("Petition") is essentially a stream-of-consciousness manifesto delineating Petitioner's personal opinions about the status of this country's legal system. Pet. at 2-26. The Petition presents no legitimate reason for this court to re-evaluate the decision of the Fourth Circuit Court of Appeals to affirm the District Court's grant of summary judgment. The District Court evaluated the facts of the petitioner's claims, then engaged in a solid legal analysis based upon well-established law to determine that summary judgment was appropriate. Pet. at App. 5a-10a. The Fourth Circuit Court of Appeals affirmed the reasoning of the district court. Pet. at App. 2a. There are simply no legitimate reasons for this Court to grant Petitioner a writ of certiorari. *See* SUP. CT. R. 10(a) (The Supreme Court considers granting writ when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or

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[2] Throughout this brief, "Pet." refers to the Petition for Writ of Certiori and "App." refers to the Appendix to this Petition.

sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.").

The legal analysis of the District Court was based upon well-established principles of ADEA statutory construction. The fourth circuit evaluates age discrimination claims under the ADEA in the same means as other circuits. The law of the fourth circuit, which has been adopted by every circuit and validated by this Court, is that ADEA claims are subject to Rule 56 disposition if (1) the plaintiff fails to establish a *prima facie* case of age discrimination, or (2) the plaintiff fails to rebut the defendant's articulated legitimate nondiscriminatory reason for its actions.

> While the proof scheme in age discrimination cases can make the summary judgment analysis somewhat trickier, a defendant can still obtain summary judgment in one of two ways. He can demonstrate that the plaintiff's proffered evidence fails to establish a *prima facie* case, or, if it does, the defendant can present evidence that provides a legitimate nondiscriminatory explanation about which the plaintiff does not create a factual dispute.

Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993); *see also O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307 (1996) (applying the *McDonnell Douglas Corp. v. Green* four-element test (411 U.S. 792, 802, 93 S.Ct. 1817 (1973)) as a guideline for establishing a prima facie case of discrimination under the ADEA).

Despite the fact that the *prima facie* scheme of establishing discrimination was developed as a means to aid

plaintiffs who are unable to offer direct proof of discriminatory motivations, (*see generally McDonnell Douglas*, (411 U.S. 792, 802, 93 S.Ct. 1817)), Petitioner Aziz informed the District Court that he refused to proceed under the indirect method of proof and that he would establish his case via direct proof. Pet. at App. 7a. Accordingly, the District Court evaluated his claims using the direct method of proof as well as the more lenient *prima facie* method of proof. Pet. at App. 7a. The Court examined the parties' discovery results, including the plaintiff's deposition testimony and interrogatory responses, and concluded that the plaintiff had failed to offer any direct or indirect proof that the College was motivated by any discriminatory animus. Pet. at App. 9a. Rather, the Court found that Petitioner relied upon his own, unsubstantiated opinion that he had been the victim of age discrimination. Pet. at App. 9a.

Although the Court found no evidence of discriminatory animus, it nevertheless continued its analysis of Appellant's allegation by reviewing the Board's articulated reasons for failing to hire the Petitioner. Pet. at App. 8a. The District Court noted that the Board offered evidence that the selectee was better qualified than the petitioner for the following reasons: "(1) the selectee was a registered professional engineer; plaintiff was not, (2) selectee had relevant experience in mining and machine tools technology; plaintiff did not, (3) selectee resided and worked in the region for fifteen years; plaintiff had only been in West Virginia once prior to his deposition, and, (4) selectee had previously been employed by the college as an adjunct professor; plaintiff had not." Pet. at App. 8a-9a. The Court declined to scrutinize the Board's

particular hiring criteria but found that the Board's articulated reasons were legitimate and non-discriminatory. Pet. at App. 9a (citing *EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4th Cir. 1992) for the proposition that a court is not in a position to evaluate the wisdom of an employer's criteria). Finally, the Court granted summary judgment for the Board based upon the lack of any direct or indirect proof of discriminatory animus, coupled with the legitimate, non-discriminatory explanations offered by the Board. Pet. at App. 9a.

In sum, the District Court engaged in a routine legal analysis based upon well-established legal principles. Despite the petitioner's optimistic urging that this Court alter the Federal Rules of Civil Procedure to disallow summary judgments, the fact is that the United States District Court for the Southern District of West Virginia carefully and properly performed the required legal analysis. Pet. at App. 4a-10a. The United States Court of Appeals for the Fourth Circuit evaluated and affirmed the District Court's decision. Pet. at App. 2a. There was nothing unusual or controversial about these decisions, and there is no need for this Court to re-evaluate them.

B. Even assuming, arguendo, that the lower courts erred in granting and affirming summary judgment for the Board, the petitioner's contentions are moot because the Eleventh Amendment is an absolute bar to the Petitioner's ADEA claim.

The petitioner filed suit based solely upon the ADEA. The respondent, the Board of Directors of the State of West Virginia Board is a state agency. This Court recently

held that the Eleventh Amendment of the United States Constitution immunizes a state from an ADEA suit filed in federal court. *Kimel et al. v. Florida Board of Regents*, No. 98-791 (Jan. 11, 2000). Although the Fourth Circuit has consistently held that the Eleventh Amendment confers immunity upon a state agency from suit filed by an individual in federal court, this Court recently clarified the Eleventh Amendment's application to claims brought under the ADEA. *See e.g., Roach v. West Virginia R.J.A.*, 74 F.3d 46, 50 (4th Cir. 1996) (remanding to state court a suit against the West Virginia Regional Jail and Correctional Facility based upon a lack of subject matter jurisdiction under the Eleventh Amendment); *Westinghouse v. West Virginia Department of Highways*, 845 F.2d 468, 469 (4th Cir. 1988) (affirming district court's dismissal of the West Virginia Department of Highways pursuant to Eleventh Amendment immunity). In *Kimel*, this Court held that the ADEA does not abrogate the States' Eleventh Amendment immunity. *Kimel*, No. 98-791. Accordingly, this Court affirmed the dismissal of several state entities based upon sovereign immunity from liability under the Eleventh Amendment. *Id.*

The Fourth Circuit Court of Appeals has, in a series of cases, clarified the interaction of Eleventh Amendment immunity and federal subject matter jurisdiction. Although the two issues are distinct, they are interrelated in that Eleventh Amendment immunity acts as a jurisdictional bar. The United States Court of Appeals for the Fourth Circuit in *Biggs v. Meadows* adopted the majority view that jurisdiction and immunity issues are distinct. *See Biggs v. Meadows*, 66 F.3d 56, 60 (4th Cir. 1995). The Court explained that while Congress has the power to

limit a state's Eleventh Amendment immunity, Congress has no power to alter a federal court's subject matter jurisdiction. *Id.* at 61. "Eleventh Amendment immunity is not truly a limit on the subject matter jurisdiction of federal courts, but a block on the exercise of that jurisdiction." The United States District Court for the Fourth Circuit has continued to use this analysis in examining Eleventh Amendment immunity. In *Suarez Corp. Industries v. McGraw*, the Court stated that the eleventh amendment is an absolute immunity which demands a federal court's withdrawal of jurisdiction. *Suarez Corp. Industries v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997); *see also Roach v. West Virginia R.J.A.*, 74 F.3d 46, 48 (4th Cir. 1996). Thus, once the Eleventh Amendment's immunity provisions are found applicable to a case, a federal court can no longer exercise jurisdiction over the immune defendants. In fact, the issue of Eleventh Amendment immunity is similar enough to subject matter jurisdiction that it, like subject matter jurisdiction, can be raised for the first time on appeal. *See Suarez Corp. Industries v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997) ("because of its jurisdictional nature, a court ought to consider the issue of Eleventh Amendment immunity at any time, even *sue sponte*").

If this Court's holding in *Kimel* is applicable to Petitioner's ADEA claim, then the petition for a writ of certiorari is moot. Assuming the District Court (and the Court of Appeals) was barred from asserting subject matter jurisdiction over the petitioner's ADEA claim, then the case should have been dismissed based upon sovereign immunity *before* the issue of summary judgment was determined. In short, whether this case was properly disposed of pursuant to a summary judgment motion or

by dismissal based upon sovereign immunity, the Petitioner's claims are no longer viable.

CONCLUSION

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the Southern District of West Virginia at Bluefield because the District Court properly granted summary judgment using a routine legal analysis based upon established legal principles. There are no contested, disputed, or controversial issues worthy of this Court's review. Even assuming, *arguendo*, that the lower courts erred in granting and affirming summary judgment for the Board, the petitioner's contentions are moot because the Eleventh Amendment is an absolute bar to the Petitioner's ADEA claim. In either case, the Petition for a Writ of Certiori should be denied.

Respectfully submitted,

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